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No. 91-1922

In The

Supreme Court of the United States

October Term, 1991

YVONNE E. DEFOOR, FRANK BOWEN, *et al.*,

Petitioners,

v.

THE STATE OF COLORADO, *et al.*,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court of The State Of Colorado

AMICUS CURIAE BRIEF OF THE COLORADO INTERGOVERNMENTAL RISK SHARING AGENCY ("CIRSA") IN SUPPORT OF THE RESPONDENTS AND IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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MOTION OF THE COLORADO INTERGOVERNMENTAL RISK SHARING AGENCY FOR LEAVE TO APPEAR AS AMICUS CURIAE

The Colorado Intergovernmental Risk Sharing Agency ("CIRSA") appears by its undersigned counsel, and requests leave of the Court pursuant to Rule 37.4 to file an *amicus curiae* brief in support of the position of the Respondent State of Colorado. A copy of the proposed brief accompanies this motion. The attorneys for the Respondents have consented to the filing of the brief; their written consents have been filed with the Clerk. The consent of the attorneys for the Petitioners was requested but refused.

A. NATURE OF THE APPLICANT'S INTEREST.

1. 113 Colorado municipalities – almost one-half the total number of Colorado municipalities – form CIRSA, a public entity insurance pool governed by its members, and providing certain liability, property, and workers' compensation protections to the members.

2. CIRSA and its members rely upon the $150,000/$400,000 minimum limits of the Colorado Governmental Immunity Act, Colo. Rev. Stat. §24-10-101 - 120. The minimum limits apply equally to the State of Colorado and to all other Colorado public entities and public employees, including Colorado's municipalities and their officers, employees, and authorized volunteers, protecting each from the threat to essential public services and functions posed by unlimited tort liability. Colo. Rev. Stat. §24-10-103(4) and (5), and §24-10-114.

3. The monetary limits of the Colorado Governmental Immunity Act significantly affect the liability protection which is available to Colorado's municipalities through CIRSA, as well as the cost of that protection. Consequently, those limits are of particular importance and substantial concern to CIRSA and its member municipalities.

4. The Petitioners' attack on the limits of the Act does not affect the Respondents alone. Rather, it affects all public entities in Colorado including municipalities, and their officials and employees.

B. QUESTIONS OF LAW THAT ARE NOT ADEQUATELY PRESENTED IN THIS CASE.

1. Contrary to the Petitioners' characterization of the two issues presented by this case, this case does not present any unsettled question of federal law warranting review by this Court. Properly characterized, the issues present no substantial federal issues and warrant denial of the Petition.

2. Permitting the filing of a brief on behalf of CIRSA would afford the Court a more complete perspective concerning the nature of the issues presented by this case and their impact on all of Colorado's public entities, officials, and employees.

Respectfully submitted,

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The Colorado Intergovernmental Risk Sharing Agency ("CIRSA"), *amicus curiae*, appears in support of the Respondent State of Colorado, and submits this brief in opposition to the Petition for Certiorari.

INTEREST OF THE *AMICUS CURIAE*

Petitioners' attack on the $150,000/$400,000 minimum limits[1] of the Colorado Governmental Immunity Act, Colo. Rev. Stat. §24-10-101 - 120 ("Act"), is directed at the State of Colorado but is of vital concern to Colorado's local governments. The Act protects all Colorado public entities and public employees, including the State, cities, towns, counties, school districts and special districts, as well as their officers, employees, and authorized volunteers. Any decision of this Court will affect each of them directly and substantially.

CIRSA is a public entity insurance pool formed by intergovernmental agreement among its member Colorado cities and towns. It provides liability protection to 113 members – which compose almost one-half of the total number of cities and towns in Colorado – as an alternative to the traditional commercial insurance market.

The need for such alternatives became particularly apparent during the so-called "insurance crisis" in 1985 and 1986, when commercial liability insurance for public entities quickly became unavailable, too costly, or too limited in scope. CIRSA's membership more than tripled during that period. The crisis even required emergency State action in 1985 to permit the State to self-insure its liability risks after its insurance coverages were cancelled and no replacement could be found.

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[1] In contrast to many statutes which place a monetary ceiling or limit on recovery, Colo. Rev. Stat. §24-10-114(1) creates monetary *minimums* on recovery. Public entities in Colorado are expressly authorized to exceed those minimums by resolution. Colo. Rev. Stat. §24-10-114(2).

CIRSA is governed by its member cities and towns, and financed through member contributions. The contributions pay for covered claims against the members and their officers and employees. The contributions are also used to buy certain excess insurance or reinsurance coverages.

CIRSA and its members rely upon the $150,000/$400,000 minimum limits of the Act. Each member remains liable for claims not covered by CIRSA, and the members are individually or jointly responsible for payment of claims if the contributions to CIRSA and the excess insurance or reinsurance coverages are insufficient.

If the $150,000/$400,000 minimum limits were invalidated, the cities and towns which participate in CIRSA would individually assume greater responsibility for the resulting unlimited liability, or be required to obtain increased coverage through CIRSA or the commercial market, if available. In either event, significantly increased costs would result. According to CIRSA testimony to a special task force formed by the Governor of Colorado after the Berthoud bus tragedy, increasing the $150,000 per person minimum to $1 million would have cost CIRSA's members approximately $13 million in additional funds for the period of 1983 through 1987. Increasing the current $400,000 per occurrence minimum to $1 million would have increased those costs by $5 million during that same period.[2]

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[2] Governmental Immunity Limits Task Force, *Report to the Governor and General Assembly*, at February 19, 1988 minutes (1988).

The amount of Petitioners' claims in this case would far exceed even those proposed increases in the limits, and financially devastate most Colorado local governments. A total of about $14.4 million was sought by eight claimants in this case; claim notices from an additional eight claimants were for an "undetermined amount"; and more claim notices were expected to be filed.

$14.4 million alone exceeds the 1989 total general revenue for all but 18 of Colorado's 270 cities and towns and all but 14 of Colorado's counties.[3] Even the $400,000 per occurrence limit of the Act exceeds the 1989 total general revenue of more than one-half of Colorado's cities and towns.[4] According to the Colorado State Auditor, the $150,000 per person limit of the Act exceeds the annual revenues of more than 350 special districts providing fire protection, drainage, recreation, cemetery, water, sanitation, and water conservation services to Colorado citizens.

Local government revenues reflect not only a limited tax base, but also limited revenue-raising power. The property taxpayer shoulders most of the tax burden of Colorado's county, school district, and special district governments, as well as some of the municipal tax burden. Annual increases in property taxes are strictly

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[3] Total revenue figures are for general government activities. State of Colorado, Division of Local Government, Department of Local Affairs, *Local Government Financial Compendium* (1989), at 71-344.

[4] *Id.*

limited by state law for most local governments. Yet despite these limits, repeated attempts have been made in recent years to impose additional limits on Colorado state and local government taxing authority. Since 1972, at least seven different tax or spending limit amendments to the Colorado Constitution have been submitted to the voters during the State's general elections (held every four years), and additional tax limitation measures are likely to appear on the 1992 general election ballot.

State and federal laws also mandate numerous local taxpayer-funded expenditures. Those mandates leave only a portion of the limited revenue available to finance services desired by the local citizens, including paving streets, filling potholes, providing fire protection and police protection, educating children, providing water and sewer services, and so forth.

Even the State's comparatively larger revenues would be severely taxed by the Petitioners' claims. The amount of $14.4 million alone equals or exceeds the entire State appropriation for 1990 for ordinary operating costs for each of the following State functions and services, among others[5]: Colorado Supreme Court, National Guard, Parks and Outdoor Recreation, Disaster Emergency Services, Division of Insurance, Civil Rights Division, Aid to Needy Disabled, Department of State, Department of Treasury, School for the Deaf and Blind, Governor's Office, Economic Development Programs, Hazardous Materials and Waste Management, Handicapped Children's Program, and Liquor Enforcement.

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[5] House Bill No. 1317, 1990 Colo. Sess. Laws, Ch. 1 (1990).

The unlimited tort liability sought by Petitioners is simply not financially feasible given the limited revenue-raising capability of Colorado's local governments and their taxpayers, and the proven unreliability of the commercial insurance market to protect local governments from losses beyond their financial means.

Colorado's local governments must look to the Act's $150,000/$400,000 minimum limits to provide some financial certainty to the scope of their tort liability. The Act helps limit financial exposure and the costs of insurance and self-insurance for claims where no immunity exists, and helps ensure that qualified persons will continue to serve in public office and employment. The Colorado General Assembly described the Act's policies in Colo. Rev. Stat. §24-10-102, as follows:

> The general assembly . . . recognizes that the state and its political subdivisions provide essential public services and functions and that unlimited liability could disrupt or make prohibitively expensive the provision of such essential public services and functions. The general assembly further recognizes that the taxpayers would ultimately bear the fiscal burdens of unlimited liability and that limitations on the liability of public entities and public employees are necessary in order to protect the taxpayers against excessive fiscal burdens. It is also recognized that public employees, whether elected or appointed, should be provided with protection from unlimited liability so that such public employees are not discouraged from providing the services or functions required by the citizens or from exercising the powers authorized or required by law.

The difficult choices inherent in allocating limited public funds when injuries of the magnitude involved in the Berthoud bus accident are suffered have been, and should remain, the province of legislatures.

REASONS FOR DENYING WRIT

I. NO SUBSTANTIAL CONFLICT EXISTS AMONG STATE COURTS OF LAST RESORT ON THE VALIDITY OF MONETARY LIMITS ON GOVERNMENTAL TORT LIABILITY UNDER THE UNITED STATES CONSTITUTION.

With the Colorado Supreme Court's previous decision in *Lee v. Colorado Department of Health,* 718 P.2d 221 (Colo. 1986), upholding the validity of the Act's $150,000 per person minimum against constitutional attack, and its decision here upholding the $400,000 per occurrence minimum, Colorado joined at least sixteen other jurisdictions which have upheld similar monetary limits.[6] All of those

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[6] *State v. DeFoor,* 824 P.2d 783 (Colo. 1992); *Wright v. Colleton County Sch. Dist.,* 301 S.C. 564, 391 S.E. 2d 564 (1990); *Grange Mut. Casualty Co. v. City of Columbus,* 49 Ohio App. 3d 50, 550 N.E. 2d 524 (1989); *Wilson v. Gipson,* 753 P.2d 1349 (Okla. 1988); *Lienhard v. Minn.,* 431 N.W.2d 861 (Minn. 1988); *Smith v. City of Philadelphia,* 512 Pa. 129, 516 A.2d 306 (1986), *appeal dismissed,* 479 U.S. 1074 (1987); *Lyles v. Penn.,* 512 Pa. 322, 516 A.2d 701 (1986); *Home Indem. Co. v. Anders,* 459 So.2d 836 (Ala. 1984); *Leliefeld v. Johnson,* 104 Idaho 357, 659 P.2d 111 (1983); *Packard v. Joint School Dist. No. 171,* 104 Idaho 604, 661 P.2d 770 (Idaho Ct. App. 1983); *Jetton v. Jacksonville Elec. Auth.,* 399 So.2d 396 (Fla. App. 1981), *petition denied,* 411 So.2d 383 (Fla. 1981); *Cauley v. City of Jacksonville,* 403 So.2d 379 (Fla.

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jurisdictions have specifically considered and upheld monetary limits on governmental liability despite arguments that such limits violate due process or equal protection guarantees of the United States Constitution or various state constitutional provisions.

No state court of last resort has ruled invalid on due process grounds general monetary limits on governmental liability, under either the United States Constitution or any state constitution.[7]

(Continued from previous page)

1981); *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 406 A.2d 704 (1979), *appeal dismissed*, 445 U.S. 921 (1980); *Sambs v. City of Brookfield*, 97 Wis.2d 356, 293 N.W.2d 504 (1980), *cert. denied*, 449 U.S. 1035 (1980); *Stanhope v. Brown County*, 90 Wis. 2d 823, 280 N.W.2d 711 (1979); *Crowe v. John W. Harton Memorial Hosp.*, 579 S.W.2d 888 (Tenn. App. 1979); *City of Austin v. Cooksey*, 570 S.W.2d 386 (Tex. 1978); *Nevada v. Kallio*, 92 Nev. 665, 557 P.2d 705 (1976); *Nevada v. Silva*, 86 Nev. 911, 478 P.2d 591 (1970); *Seifert v. Standard Paving Co.*, 64 Ill.2d 109, 355 N.E.2d 537 (1976), *overruled on other grounds, Rossetti Contracting Co. v. Court of Claims*, 109 Ill.2d 72, 485 N.E.2d 332 (1985); *Hale v. Port of Portland*, 308 Or. 508, 783 P.2d 506 (1989); *Sibley v. Board of Supervisors*, 462 So.2d 149 (La. 1985); and *Consoli v. Municipio de San Juan*, 408 F.Supp. 384 (D. Puerto Rico 1975).

[7] Review of the three separate majority opinions in the 3-2 *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989) decision reveals no majority support even in Utah for the application of a *"quid pro quo"* or "substitute remedy" test for substantive due process purposes. Only two members approved a due process analysis; a third member disapproved as inappropriate the application of any substantive due process analysis. *Id.* at 360, 369.

No state court of last resort has ruled invalid on equal protection grounds general monetary limits on governmental liability with the exception of the Montana Supreme Court, which shortly thereafter reversed itself.[8]

II. NO SUBSTANTIAL OR IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED.

A. No substantial equal protection question is presented.

The Petitioners assert that the Court has never addressed the issue of the standard of equal protection scrutiny to be applied to liability limitation laws. On the contrary, the Court has adopted, and Colorado and numerous other states have followed, a "rational basis" test in evaluating equal protection challenges to such laws. No need exists to address the issue in this case.

In *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 83 (1978), the Court adopted a rational basis test in evaluating a liability limitation statute against equal protection and due process challenges. In that case, the Court upheld the Price-Anderson Act, a federal statute limiting liability for nuclear incidents. The

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[8] The Montana Supreme Court decision in *Pfost v. Montana*, 291 Mont. 206, 713 P.2d 495 (1985), while addressing equal protection arguments, was based on an interpretation of the access guarantee of the Montana Constitution subsequently overruled in *Meech v. Millhaven West, Inc.*, 238 Mont. 21, 776 P.2d 488 (1989).

Only two of the members of the Utah Supreme Court thought equal protection principles would invalidate the particular Utah statute at issue in *Condemarin*, 775 P.2d at 369-370.

Court rejected the argument that an intermediate standard of review should be applied, describing the liability limitations in the act as "a classic example of an economic regulation – a legislative effort to structure and accommodate the burdens and benefits of economic life." *Id.* at 83. The Court stated that such acts "come to the Court with a presumption of constitutionality," and that the burden is on the complaining party to "establish that the legislature has acted in an arbitrary and irrational way." *Id. See also Dandridge v. Williams,* 397 U.S. 471, 485-486 (1970) (upholding on the basis of rational basis test monetary limitations on welfare grant amounts).

Citing *Duke Power* for the proposition that liability limits are classic examples of economic regulation subject to rational basis review, the Colorado Supreme Court likewise applied a rational basis test to the Petitioners' equal protection attack on the Act's monetary minimums. *DeFoor,* 824 P.2d at 787.

Petitioners assert incorrectly that a conflict exists among the states as to the proper scrutiny level to be applied in an equal protection analysis of a liability limitation statute. While divergence exists among the states, it reflects state law differences in the existence and nature of the right under scrutiny – differences resulting from the states' interpretations of their own constitutions – not disagreement as to the proper level of scrutiny. The divergence is not the result of a conflict in federal law.

Some states recognize under the "access to court" provisions of their constitutions a right to full recovery for damages. *See, e.g., Condemarin,* 775 P.2d at 348; *Trujillo v. City of Albuquerque,* 110 N.M. 621, 798 P.2d 571, 573

(1990). However, Colorado is not among those states. *DeFoor*, 824 P.2d at 792. Colorado's access guarantee, Colo. Const. Art. II, §6, "merely provides that, if a right does accrue under the law, the courts must be available to effectuate that right." *Dove v. Delgado*, 808 P.2d 1270, 1275 (Colo. 1991). It does not protect plaintiffs from the elimination of a remedy, *Goldberg v. Musim*, 162 Colo. 461, 427 P.2d 698, 703 (1967), nor from limitations on liability, *Shoemaker v. Mountain States Tel. & Tel. Co.*, 38 Colo. App. 321, 559 P.2d 721, 723 (1976).

Because the nature of the interest at stake determines the applicable equal protection test, states recognizing a right to full recovery of damages under their own state constitutions have used an intermediate level of scrutiny. *See, e.g., Trujillo*, 798 P.2d at 573; *Hanson v. Williams County*, 389 N.W. 2d 319 (N.D. 1986). In contrast, Colorado and other states in which no such right is recognized properly have used a rational basis standard of scrutiny. See note 6 *supra*.

These differences reflect the exercise by the states of their right to fashion their own liability rules. *See Martinez v. California*, 444 U.S. 277, 282 (1980). Petitioners do not – and cannot – identify any overriding federal interest that extinguishes that right. A state's interest in "fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Id.*

B. No substantial due process question is presented.

The Petitioners assert that the Court should address the question whether due process requires liability limitation laws to provide a *quid pro quo* for any common law remedies they supplant. However, this Court has addressed this question in prior decisions, and the Colorado Supreme Court's holding is consistent with those decisions.

Duke addressed the issue of a legislative *quid pro quo*. The Court stated that "it is not at all clear that the Due Process Clause requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." *Duke*, 438 U.S. at 88. The Court noted:

> Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," despite the fact that "otherwise settled expectations" may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Id. [citations omitted]. *See Martinez*, 444 U.S. at 282.[9]

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[9] Petitioners cite *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) and *Martinez*, 444 U.S. at 281-282,

(Continued on following page)

Other decisions of this Court have addressed this issue even more explicitly. For instance, in *Munn v. Illinois*, 94 U.S. 113 (1876), the Court stated that the common law is "no more sacred than any other" form of law. *Munn*, 94 U.S. at 134. Similarly, in *Arizona Copper Co. v. Hammer*, 250 U.S. 400 (1919), the Court stated that common law rules "are no more than rules of law, deduced by the courts as reasonable and just, under the conditions of our civilization . . . . They are not placed, by the Fourteenth Amendment, beyond the reach of the state's power to alter them, as rules of future conduct and tests of responsibility, through legislation designed to promote the general welfare . . . . " *Arizona Copper*, 250 U.S. at 421. *See also Silver v. Silver*, 280 U.S. 117, 122 (1929).

The proposition that common law rules deserve no special protection from change is even more compelling where, as in Colorado, the common law was not preserved by the State Constitution but rather, was adopted by the legislature by statute:

> The common law of England so far as the same is applicable and of a general nature, and all acts and statutes of the British parliament, made in aid of or to supply the defects of the common law prior to the fourth year of James the First, excepting the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of

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for the contention that their claim is property protected by the Fourteenth Amendment's Due Process Clause. However, neither decision supports this contention. At most, *Martinez* posed such a proposition hypothetically. *Id.*

> thirty-seventh Henry the Eighth, and which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.

Colo. Rev. Stat. §2-4-211.

Critical to Petitioners' argument that due process requires a *quid pro quo* analysis is the existence of a property interest in a common law remedy. However, as with Petitioners' equal protection argument, the existence of such an interest is dependent upon each state's own common law, constitutional, and statutory schemes. Upon reviewing Colorado's common law, constitutional and statutory schemes, the Colorado Supreme Court found no cognizable property interest in Petitioners' claims. *DeFoor*, 824 P.2d at 791-792; *Vogts v. Guerrette*, 142 Colo. 527, 351 P.2d 851, 857 (1960). Colorado does not recognize a property interest in any particular remedy. *Id.* Thus, the Colorado Supreme Court properly declined to apply any *quid pro quo* analysis.

III. GRANTING CERTIORARI WOULD UNNECESSARILY PLACE IN QUESTION THE VALIDITY OF THE MONETARY LIMITS AND ADVERSELY AFFECT THE INSURANCE COVERAGES AVAILABLE TO GOVERNMENTAL ENTITIES.

As discussed in Section I *supra*, recent history has shown that Colorado's local governments are not the type of clients desired by the commercial insurance market. CIRSA's members rely upon that market for certain excess insurance or reinsurance coverages. The market in turn relies upon the monetary limits in deciding whether

to provide coverage and the scope of coverage. Any threat to the validity of the limits, such as granting certiorari in this case, can affect the insurance market in Colorado and elsewhere. No reason exists nor has any reason been presented by Petitioners to warrant such a result.

CONCLUSION

This Court has rejected at least three separate opportunities to review state governmental liability limits in which due process or equal protection issues were raised. *Estate of Cargill; Sambs; Smith.* No reason exists to accept the opportunity presented by the Petitioners in this case.

Respectfully submitted,

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